

1 Q. Why was Neiman Marcus not one of
2 the marks that you surveyed in this case?

3 A. Well, looking at this exhibit,
4 both the other two search engines -- the
5 sponsored links are well-known brands, so one
6 wouldn't expect to find Neiman Marcus, buy
7 Neiman Marcus clothes at a Bergdorf or
8 Bloomingdales stores. Clearly they were
9 competitive. Searchers were not likely to
10 think, yes, I can buy clothes from Neiman Marcus
11 at Bloomingdales.

12 Q. Why was that important to your
13 work in this case?

14 A. Again, I was trying to find out
15 for sponsored links the likelihood if they are
16 to buy directly from those. It seems to me if
17 you get one that is a direct competitor that the
18 answer is going to be no, I know both brands.
19 The equivalent example would be can I buy
20 Dunkin' Donuts at McDonald's or Krispy Kreme
21 donuts. Clearly not.

22 Q. You wouldn't expect any consumer
23 confusion with respect to those two you just
24 mentioned?

25 A. That is correct, I would not.

1 Q. You would not expect any initial
2 confusion between Neiman Marcus or Bloomingdales
3 or Bergdorf Goodman; correct?

4 MR. FENSTER: Object to form.

5 THE WITNESS: I wouldn't think so,
6 they are both well-known brands or marks.

7 BY MR. MORAN:

8 Q. So at this point in time have you
9 decided on the marks you were going to survey as
10 of April 8th or are you still looking for marks
11 to survey?

12 A. We were still looking at that
13 time. I hadn't decided, we hadn't decided as to
14 what marks would be appropriate.

15 Q. Okay. What was going to be the
16 determining factor as to what would be the
17 appropriate mark or marks to survey?

18 A. Marks where there was -- they
19 weren't clearly identifiable as competitors,
20 where it wasn't clear, for example, that the --
21 the companies are in direct competition, trying
22 to find sponsored links that were of not direct
23 competitors.

24 Q. Why?

25 A. Because the whole issue is whether

1 Q. So did you go to the various
2 sponsored links and then click through that
3 sponsored link and ascertain or determined
4 whether or not they could purchase tickets or
5 not purchase tickets on Southwest Airlines? Is
6 that how you chose the sponsored links?

7 MR. FENSTER: Excuse me. Object
8 to form.

9 THE WITNESS: That's how Southwest
10 Airlines was selected, because it was my
11 understanding and confirmed by Mr. Meyer that
12 you can't buy Southwest Airlines tickets on
13 anything other than Southwest Airlines.

14 And the second one that was
15 suggested either by Mr. Meyer or me was the Trek
16 website and looking at the Trek website I didn't
17 see evidence that they sold -- at the sponsored
18 link I didn't see where they sold or any
19 evidence that they sold Trek bicycles.

20 BY MR. MORAN:

21 Q. As a result of that investigation,
22 that determination by you, you decided in this
23 case to survey as to that particular sponsored
24 link?

25 A. That seemed to be an appropriate

1 because -- you see below it it's not space, it's
2 specs to be determined, okay, not space. So
3 it's specifications to be determined and those
4 were, again, with the first one, identified
5 regular airline travelers. If you look at the
6 screener questions, do you use an airline, would
7 you use an airline search engine to buy airline
8 tickets.

9 And I estimated that you see a
10 10 percent and then the second one, the same
11 criteria, but here I thought it was actually
12 going to be more difficult because we had to
13 identify people who rode bicycles. We have to
14 go back and look at the screener questions.

15 Q. Why was it important to you to
16 attempt to target regular airline travelers?

17 A. Well, because, the Southwest
18 sample has to be people from the universe of
19 airline travelers. If they don't go back and
20 look at the surveys -- if they don't travel on
21 airline then they're not likely to search for
22 airline tickets using a Google search or
23 Southwest Airlines.

24 Similarly, if they are not bicycle
25 riders oriented in possibly buying a bicycle

1 they wouldn't know of or consider a Trek
2 bicycle, searching for Trek bicycles. So it's
3 getting people in the universe of the -- so I,
4 was able to draw the appropriate sample from the
5 appropriate universe.

6 Q. All right. And we'll talk about
7 the universe a little bit later, but do you know
8 how many invitations were extended for potential
9 respondents on the Trek survey?

10 A. I don't know. I mean, in my
11 report there's a footnote as to the number of
12 people who responded to the Southwest and the
13 Trek survey. And the significantly
14 higher percent -- the issue is screen outs
15 versus completes and a significant number of
16 people who responded to the Trek survey screened
17 out because they didn't meet the screening
18 criteria, so the number was higher. Again,
19 using the 10 percent initial estimate, that's
20 what I would base it on.

21 Q. Okay. So it would be your
22 testimony that at least or approximately 2,000
23 invitations would have been extended for the
24 Southwest survey and 2,000 for the Trek survey,
25 perhaps more for the Trek?